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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

GERARDO MAGANA,

Defendant and Appellant.

F056324

(Super. Ct. No. MCR025976)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Madera County. Eric C. Wyatt, Judge.

Julia L. Bancroft, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

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*Before Wiseman, Acting P.J., Levy, J., and Cornell, J.

FACTS AND PROCEEDINGS

On November 6, 2007, appellant, Gerardo Magana, was charged in an information with possession of heroin (Health & Saf. Code, § 11350, subd. (a), count one),¹ possession of methadone (§ 11350, subd. (a), count two), possession of heroin for sale (§ 11351, count three), and transportation of heroin (§ 11352, subd. (a), count four.) The information alleged one prior drug related conviction pursuant to section 11370.2, subdivision (a).

On January 2, 2008, the prosecutor filed a motion to obtain disclosure of appellant's medical records pursuant to 42 Code of Federal Regulations part 2.65. The prosecutor sought to rebut an assertion appellant made to the police that he obtained the methadone from a clinic in Fresno. On January 4, 2008, appellant objected to the motion because he was not originally served with it, and the motion to the court constituted an ex parte communication between the prosecutor and the court.² The court issued an order for disclosure and use of patient records.

On February 2, 2008, appellant filed a motion to disqualify Judge Wyatt. Judge Wyatt denied the motion. Appellant filed a new motion to disqualify Judge Wyatt on March 11, 2008. Judge Wyatt filed a declaration on March 19, 2008, denying any wrongdoing. The parties stipulated that a local judge could hear questions concerning Judge Wyatt's disqualification.

On April 21, 2008, Judge DeGroot issued a written opinion finding that the federal regulation in question does not require that defendant or defense counsel be served with a request for records, though a legal treatise notes it is better practice to do so. The court noted that all evidence is discoverable if the prosecution seeks to admit it at trial. The

¹ Unless otherwise noted, all statutory references are to the Penal Code.

² The prosecutor represented at the hearing that she contacted the methadone clinics in Fresno and appellant was not a patient at any clinic. !(RT 613-615)!

court further found that the prosecutor was not acting in bad faith or to gain advantage, and there was no judicial misconduct. The court held Judge Wyatt should not be recused.

On August 20, 2008, appellant filed a motion to dismiss the case for gross professional misconduct by the prosecutor. At a hearing on August 25, 2008, the trial court denied appellant's motion. Appellant then entered into a plea agreement whereby he would admit one count of possession of heroin for sale and one enhancement allegation of a prior narcotics conviction.³ Appellant executed a declaration regarding guilty plea acknowledging and waiving his constitutional rights pursuant to *Boykin/Tahl*.⁴

The court explained to appellant that he faced a sentence of three years for possession of heroin for sale plus three years for the prior conviction enhancement. The court explained appellant's rights pursuant to *Boykin/Tahl*. Appellant acknowledged and waived these rights. The court explained the other consequences of appellant's plea. The parties stipulated to a factual basis for the plea.⁵ Appellant acknowledged executing and understanding the plea declaration form. Appellant pled no contest to count two, possession of heroin for sale, and admitted one prior narcotics conviction.

On September 22, 2008, the trial court sentenced appellant to prison for three years on count one plus three years consecutively for the prior conviction. The appellant was certified to the California Rehabilitation Center. The court imposed a restitution fine

³ On June 24, 2008, the prosecutor filed a first amended information. In the amended information, the allegation that appellant transported heroin was set forth in count two. The first amended information reordered the felony allegations and added a second narcotics conviction enhancement.

⁴ *Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122 (*Boykin/Tahl*)

⁵ On the evening of March 12, 2006, a Madera police officer stopped appellant who was riding a mountain bicycle without a headlamp. Appellant told the officer that he was on probation. Appellant appeared nervous during the detention. During a pat-down search, the officer found a vial of methadone in appellant's pants pocket. Appellant explained he was in a methadone program in Fresno. The officer also found three baggies of what later proved to be heroin.

and granted applicable custody credits. Appellant filed a timely notice of appeal but did not obtain a certificate of probable cause.

DISCUSSION

Appellant's appointed appellate counsel has filed an opening brief which summarizes the pertinent facts, raises no issues, and requests this court to independently review the record. (*People v. Wende* (1979) 25 Cal.3d 436.) The opening brief also includes the declaration of appellate counsel indicating that appellant was advised he could file his own brief with this court. By letter on February 26, 2009, we invited appellant to submit additional briefing. To date, he has not done so.

After independent review of the record, we have concluded there are no reasonably arguable legal or factual issues.

DISPOSITION

The judgment is affirmed.